UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re NATIONAL SECURITY LETTER

13 cv 2642 (RJS)

FILED UNDER SEAL PURSUANT TO 18 U.S.C. § 3511(d) AND SEALING ORDER DATED APRIL 22, 2013

Memorandum of Law in Support of Respondent Motion for Reconsideration of the Court's Order of June 7, 2013, Granting the Government's Request to Redact Information Identifying

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Preliminary Statement

Respondent is committed to being transparent with its users and the public regarding its receipt of, and compliance with, requests from government agencies around the world for the production of users' information and/or communications. The government's use of compulsory legal process has always been the subject of intense public interest. As set forth below, recent events have both heightened public interest and demonstrated the need for greater transparency. Absent a compelling government interest in suppressing the identity of the recipient of the National Security Letter ("NSL") that is the subject of the above-captioned matter—and there is no such compelling interest— has a First Amendment right to communicate transparently with its users and the public regarding its receipt of the NSL. Accordingly, based on the newly discovered evidence described below, respectfully requests that the Court reconsider its June 7, 2013 Order granting the government's proposed redaction of identifying information from the pleadings.

Background

1. Legal Background

motion for reconsideration is governed by the First Amendment and by the relevant NSL statutes as they apply to request to disclose its identity as the NSL recipient in this matter. The First Amendment, in pertinent part, prohibits the government from "abridging the freedom of speech." U.S. CONST. amend. I. That provision generally protects a right of public access to judicial proceedings. *See, e.g.*, *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). In this case, the First Amendment interests are even greater because the government seeks not only to prevent the public from accessing this court's records but also to

prohibit [redacted] from speaking about its own involvement in the litigation. As the Second Circuit noted when it last reviewed the NSL regime:

> A judicial order forbidding certain communications when issued in advance of the time that such communications are to occur is generally regarded as a prior restraint, and is the most serious and least tolerable infringement on First Amendment rights. Any prior restraint on expression comes to [a court] with a heavy presumption against its constitutional validity, and carries a heavy burden of showing a justification.

Doe v. Mukasey, 549 F.3d 861, 871 (2d Cir. 2009) (internal quotations and citations omitted). The presumption against suppression, and the burden of overcoming it, are all the heavier where, as here, the desired expression relates to political and social issues of public interest. As the Supreme Court observed:

> The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. [S]peech concerning public affairs is more than self expression; it is the essence of self-government. Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.

Connick v. Myers, 461 U.S. 138, 145 (1983) (internal quotations and citations omitted).

Against the First Amendment's strong, inherent presumption against prior restraint, particularly of expression regarding matters of deep and enduring public interest, the government seeks to enforce application of the NSL provision of the Stored Communications Act, 18 U.S.C. § 2709. That section purports to prohibit a service provider like [redacted] from disclosing "that the Federal Bureau of Investigation has sought or obtained access to information or records under this section" if an appropriate FBI official "certifies that otherwise there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or safety of any person." *See* § 2709(c)(1).

When the recipient of an NSL requests that a court review the constraints upon disclosure, as has done here, "the court may modify or set aside such nondisclosure requirement if it finds that there is no reason to believe that disclosure may" have any of these enumerated adverse effects. 18 U.S.C. § 3511(b)(2). To conform these statutory provisions to Constitutional commands, the Second Circuit has construed "subsection 2709(c)(1) to mean that the enumerated harms must be related to 'an authorized investigation to protect against international terrorism or clandestine intelligence activities'" and "subsections 3511(b)(2) and (3) to place on the Government the burden to persuade the district court that there is a good reason to believe that disclosure may result in one of the enumerated harms, and to mean that a district court, in order to maintain a nondisclosure order, must find that such a good reason exists." *Doe v. Mukasey*, 549 F.3d at 876.

The question before the Court, therefore, is whether, taking into account the First Amendment's strong, inherent presumption against prior restraint of expression regarding matters of public interest, the government has offered a reason that, in light of recent events, can withstand such searching scrutiny to believe that confirmation of the single, already-public piece of information to which motion relates—its identity—may result in danger to national security, interference with an investigation, interference with diplomatic relations, or danger to the life or safety of any person. For the reasons set forth below, the government has not provided such a reason, nor can it do so. Accordingly, identity should be unsealed and the corresponding redactions should be removed from the pleadings and papers in this matter.

2. Factual Background

The Court is well aware of the factual background of this matter and of the general public interest in the use of lawful national security authorities such as the NSL provision. *See, e.g. In*

re National Security Letter, No. 13 Civ. 2642 (RJS) (S.D.N.Y. May 31, 2013) (sealed order noting public interest in and discussion of this matter without any objection from the government). Accordingly, this memorandum further develops only those facts that bear directly on disposition of the current motion.

[redacted] is committed to being transparent with its users and the public regarding its receipt of, and compliance with, requests from government agencies around the world for the production of users' information and/or communications. [redacted] publishes a [redacted] In 2013, following discussions with the government, [redacted] The fact that [redacted] receives NSLs is thus already a matter of public record. [redacted]

[redacted] has honored the sealing order of both this Court and the Northern District of California. Nonetheless, the press has widely reported that [redacted] is the provider [redacted]

[1] [redacted]

[2] [redacted]

[redacted][3] The sealing orders thus have unintentionally served not to protect the fact that [redacted] is the non-government party in these matters, but only to gag [redacted] and prevent it from commenting on what is a widely acknowledged fact.

On June 6, 2013, the public's already healthy interest in Google's receipt of, and response to, national security legal process skyrocketed. [redacted] The news coverage has prompted public debate about the appropriate scope of government surveillance programs, a debate the President has encouraged. See http://www.whitehouse.gov/the-press-office/2013/06/06/press-gaggle-deputy-principal-press-secretary-josh-earnest-and-secretary ("We welcome that debate.").

On June 7, 2013, [redacted]

[3] [redacted]

In light of the broadly available misinformation about receipt of and compliance with national security process and the concerns and questions of its users and the public, but respectful of the government's legitimate interest in protecting national security, seeks to advance the public debate by taking reasonable, limited steps to increase transparency regarding its practices. On June 18, 2013, That motion remains pending.

Argument

I. First Amendment Right to Confirm Its Involvement in this Matter Is No Longer Overcome by Good Reason to Believe that such Confirmation Will Have One of the Statutorily Enumerated Adverse Effects.

In order to maintain the requirement that identity remain sealed and be redacted from the pleadings and papers, the Court must find that a good reason exists to believe that disclosure of identity may result in one of the statutorily enumerated harms. *See Mukasey v. Doe*, 549 F.3d at 876. Even if such a finding could have been justified before June 6, it is no longer sustainable. Since June 6, nearly every major Western publication has run stories (most of them inaccurate) regarding receipt of and compliance with national security process. Whereas the government's request to redact identity may have made sense on June 5, maintaining the redaction now serves only to protect a secret that everyone already knows. Whatever causal relationship the disclosure of the fact that receives national

security process may bear to the harms enumerated in the statute, the events of the past several weeks have placed matters inexorably on that causal path in any event. At this point, prohibiting [redacted] from disclosing that it is the party in this matter serves only to censor [redacted] ability to inform the public debate, to prevent it from fulfilling its promise of transparency, and to constrain it in its defense of its business. With the government's interest in non-disclosure substantially reduced by leaks and widespread reporting, the First Amendment no longer permits the prior restraint of [redacted] speech on this matter of profound and urgent public interest.

Accordingly, in light of these new facts, [redacted] respectfully requests that the Court reconsider its June 7, 2013 Order and order that [redacted] identity as the Respondent in this matter be unsealed and that the redactions relating to its identity be removed.

Dated: June 20, 2013
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